CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1973.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-829

LEILA MOURNING,

Petitioner,

v.

FAMILY PUBLICATIONS SERVICE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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February 25, 1972.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida is reported at 4 CCH CONSUMER CREDIT GUIDE ¶ 99,632 (1970) (Mehrtens, J.). The opinion of the United States Court of Appeals for the Fifth Circuit, reversing the decision of the District Court, is reported at 449 F.2d 235 (1971).

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1971. The petition for a writ of certiorari was filed on December 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

1. Whether transactions in which consumers prepay for goods involve an extension of consumer credit within the meaning of the Truth in Lending Act (15 U.S.C. §§ 1601-65 (1970)) and Regulation Z (12 C.F.R. §§ 226.1-.12 (1971)) promulgated thereunder by the Federal Reserve Board.

2. Whether transactions that do not entail any finance charges are subject to the civil and criminal penalties of the Truth in Lending Act by virtue of the Federal Reserve Board's four installment rule.

3. Whether, under 15 U. S. C. § 1640(a) (which provides for a penalty equal to "twice the amount of the finance charge in connection with the transaction except . . . [not] less than $100 nor greater than $1,000"), a penalty may be imposed where the transaction in question does not entail a finance charge.

STATUTES AND REGULATIONS INVOLVED

The statute to be construed is the Truth in Lending Act, 15 U.S.C. §§ 1601-65 (1970). The regulation to be construed is to be found in Regulation Z, 12 C.F.R. §§ 226.1-.12 (1971), promulgated by the Federal Reserve Board.

The Act provides, in pertinent part, as follows:

> "§ 1601. Congressional findings and declaration of purpose
>
> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged

in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."

"§ 1602. Definitions and rules of construction

. . . .

(e) The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term 'creditor' refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this subchapter apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

(g) The term 'credit sale' refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract."

"§ 1605. Determination of finance charge—Definition

(a) Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit, including any of the following types of charges which are applicable:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges."

"§ 1607. Administrative enforcement—Enforcing agencies

(a) Compliance with the requirements imposed under this subchapter shall be enforced under

(1) section 1818 of Title 12, in the case of

(A) national banks, by the Comptroller of the Currency.

(B) member banks of the Federal Reserve System (other than national banks), by the Board.

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation.

(2) sections 1426(i), 1437, 1464(d), and 1730 of Title 12, by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions.

(3) the Federal Credit Union Act, by the Director of the Bureau of Federal Credit Unions with respect to any Federal credit union.

(4) the Acts to regulate commerce, by the Interstate Commerce Commission with respect to any common carrier subject to those Acts.

(5) the Federal Aviation Act of 1958, by the Civil Aeronautics Board with respect to any air carrier or foreign air carrier subject to that Act.

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act."

"§ 1611. Criminal liability for willful and knowing violation

Whoever willfully and knowingly

(1) gives false or inacurate information or fails to provide information which he is required to disclose under the provisions of this subchapter or any regulation issued thereunder,

(2) uses any chart or table authorized by the Board under section 1606 of this title in such a manner as to consistently understate the an-

nual percentage rate determined under section 1606(a)(1)(A) of this title, or

(3) otherwise fails to comply with any requirement imposed under this subchapter,

shall be fined not more than $5,000 or imprisoned not more than one year, or both."

"§ 1612. Penalties inapplicable to governmental agencies

No civil or criminal penalty provided under this subchapter for any violation thereof may be imposed upon the United States or any agency thereof, or upon any State or political subdivision thereof, or any agency of any State or political subdivision."

"§ 1631. General requirement of disclosure

(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part."

"§ 1633. Exemption for State-regulated transactions

The Board shall by regulation exempt from the requirements of this part any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those

imposed under this part, and that there is adequate provision for enforcement."

"§ 1640. Civil liability—Failure to disclose

(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court."

Regulation Z provides, in pertinent part, as follows:

"§ 226.2 Definitions and rules of construction

For the purposes of this part, unless the context indicates otherwise, the following definitions and rules of construction apply:

. . . .

(d) 'Amount financed' means the amount of credit of which the customer will have the actual use determined in accordance with paragraphs (c)(7) and (d)(1) of § 226.8.

. . . .

(k) 'Consumer credit' means credit offered or extended to a natural person, in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes and for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments. 'Consumer loan' is one type of 'consumer credit.'

(l) 'Credit' means the right granted by a creditor to a customer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor. (See also paragraph (bb) of this section.)

(m) 'Creditor' means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit.

(n) 'Credit sale' means any sale with respect to which consumer credit is extended or arranged by the seller."

"§ 226.8 Credit other than open end—specific disclosures

(a) *General rule.* Any creditor when extending credit other than open end credit shall, in accordance with § 226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969."

STATEMENT OF THE CASE

Respondent, Family Publications Service, Inc. ("FPS"), was engaged in the business of soliciting subscriptions and offering contracts for the delivery of a large number of well-known national periodicals. (Pet. App. 7a*.) Under FPS's standard form of contract, a customer receives the magazines he selects for 48 (or 60) months and pays for them monthly over the first 24 (or 30) months.** Under this plan, at any point in time prior to the end of the contract period, the customer has paid for more issues than he has received, so that FPS is not in any sense financing a debt for, or "carrying", the customer. The payments are in fact prepayments by the customer for magazines to be delivered to the customer in the future. Petitioner did not contend and the district court did not find that FPS's contract imposes any finance charge on the customer. (Pet. App. 12a.)

Under the terms of the FPS contract executed by petitioner on August 19, 1969, she was to receive Ladies Home Journal, Holiday, Life, and Travel and Camera for 60 months in return for an initial payment of $3.95 and 30 monthly payments of $3.95. Although she received the magazines ordered, petitioner defaulted on her contract and never made any payments beyond the initial $3.95 payment. Consequently, her contract was cancelled by FPS on April 15, 1970. (Pet. App. 8a.)

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*References cited to "Pet. App." are to the opinions of the district court (Pet. App. 1a-5a) and the court of appeals (Pet. App. 6a-23a) which are printed in the Petitioner's Appendix.

**In a relatively small number of cases FPS's customers elected to pay the full purchase price at the outset rather than over 24 (or 30) months. We have recently discovered that, contrary to representations made below, a small number of those customers (representing a small fraction of 1% of FPS's total customers) may have been charged less than the aggregate purchase price under FPS's standard form of contract.

Petitioner Mourning commenced this action in the United States District Court for the Southern District of Florida on April 22, 1970, on her own behalf and on behalf of a class comprised of all residents of Dade County, Florida, who had entered into contracts with FPS since July 1, 1969 (the effective date of the Truth in Lending Act). The second amended complaint ("the complaint") alleged that the FPS standard form contract did not contain the disclosure of credit terms required by the Truth in Lending Act and the Regulations promulgated thereunder by the Federal Reserve Board. The complaint prayed for a civil penalty of not less than $100 nor more than $1,000 on behalf of each member of the class, together with attorneys' fees and the cost of the action, as provided for in 15 U.S.C. § 1640(a).

The Act provides that creditors who extend consumer credit "for which the payment of a finance charge is required" (15 U.S.C. § 1602 (f)) shall make specified disclosures (15 U.S.C. § 1631), including the amount of the finance charge and the finance charge expressed as an annual percentage rate. Regulation Z promulgated by the Federal Reserve Board provides that such disclosures must be made in credit transactions involving repayment in more than four installments, regardless of whether a finance charge is involved (12 C.F.R. §§ 226.2 (k) and (m), 226.8). For failure to make the required disclosures, the Act imposes both criminal (15 U.S.C. § 1611) and civil penalties (15 U.S.C. § 1640), as well as administrative sanctions under the Federal Trade Commission Act (15 U.S.C. § 1607). The civil penalty section of the Act, under which petitioner's claim arises, provides for liability

> "in an amount equal to . . . twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall

not be less than $100 nor greater than $1,000 . . . ." 15 U.S.C. § 1640.

On August 28, 1970, both parties moved for summary judgment. Petitioner contended that her transaction with FPS was subject to the Act by virtue of Regulation Z because it was a credit transaction payable in more than four installments and that she was entitled to recover a civil penalty regardless of whether the transaction entailed a finance charge. FPS contended that the transaction was not subject to the disclosure and penalty provisions of the Act because, *inter alia*, (1) it was not a credit transaction, (2) the disclosure and penalty provisions of the Act do not apply in the absence of a finance charge, and (3) the Regulations could not extend the scope of the Act. Both parties concurred in the view that there were no material issues of fact and that the sole question to be decided was the proper reach of the disclosure and penalty provisions of the Act and the Regulations.

On November 27, 1970, the district court rendered its final decision (1) dismissing the class allegations in the amended complaint, (2) denying FPS's motion for summary judgment, and (3) granting judgment in favor of Leila Mourning in the amount of $100, together with $1,500 attorney's fee and costs. The court held that "the transaction here in question falls squarely within the scope of the Act and its Regulations *by virtue of the 'more than four installments' rule*, 12 CFR § 226.2(k). . . ." (Pet. App. 4a) (emphasis added).

On December 11, 1970, FPS filed its notice of appeal from the district court's order and the judgment entered thereon in so far as the order granted plaintiff's motion for summary judgment and denied FPS's motion for summary judgment.

On September 27, 1971, the court of appeals reversed and remanded with directions that the complaint be dismissed. The court found that under the Act "three essential elements must be found present together in a transaction" before the duty to make the specified disclosures arises: (i) a creditor (ii) who extends consumer credit (iii) for which a finance charge has been imposed (Pet. App. 17a-18a). The court also found, in accord with the position taken by the United States as amicus curiae, that under the regulation promulgated by the Federal Reserve Board

> "in order for the disclosure and penalty provisions of the Truth-in-Lending Act to be applicable, all that is required is that the transaction involve the extension of credit which, pursuant to agreement, is or may be payable in more than four installments. No showing or finding of the imposition, directly or indirectly, of a finance charge is necessarily required." (Pet. App. 18a.)

The court concluded that "an inconsistency exists between the four installment rule and the Truth-In-Lending Act" and that, in promulgating the rule, the Board had "over-stepped the authority granted to them under 15 U.S.C., § 1604". (Pet. App. 19a) Relying on this Court's decisions in *Commissioner of Internal Revenue* v. *Acker*, 361 U.S. 87 (1959), and similar cases, the Court of Appeals held that the Board's rule constituted an invalid "administrative endeavor to amend the law as enacted by the Congress and to thereby make the Act reach transactions which the Congress by its statutory language did not seek or intend to cover by its enactment." (Pet. App. 20a.)

Having found the Act inapplicable to the transaction in issue by reason of the invalidity of the four installment rule, the court of appeals did not find it necessary to con-

der FPS's further contentions (1) that the Act is inapplicable because FPS did not extend consumer credit but rather was prepaid by its customers, and (2) that the civil penalty provision of the Act, providing for a penalty equal to "twice the amount of the finance charge imposed", is inapplicable where the transaction in question does not involve a finance charge.

ARGUMENT

The decision below is clearly correct. It is not in conflict with the decision of any other court of appeals. Moreover, the decision below is sustainable on independent grounds not reached by the court below. Accordingly, further review is not warranted.

1. The court of appeals was clearly correct in concluding that the four installment rule is inconsistent with the Act and, therefore, invalid. The declared congressional purpose in enacting the Truth in Lending Act was to assure "[t]he informed use of credit [which] results from an awareness of the *cost* thereof by consumers". 15 U.S.C. § 1601 (1970) (emphasis added). Contrary to petitioner's assertion (Pet. 9), the Act does not require disclosure in all credit transactions, but only in credit transactions involving a finance charge. Three separate sections of the Act reiterate the finance charge requirement and make the congressional purpose clear beyond doubt. Section 1602(f) provides in applicable part:

> "The term 'creditor' refers *only* to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a *finance charge* is required...." (Emphasis added.)

The disclosure requirement set forth in § 1631(a) provides:

> "Each creditor [as defined in § 1602 (f)] shall disclose clearly and conspicuously, in accordance with the regulations of the [Federal Reserve] Board, to each person to whom consumer credit is extended and upon whom a *finance charge* is or may be imposed, the information required under this part." (Emphasis added.)

Finally, under § 1640(a), the civil liability for failing to make the required disclosures is stated to be "twice the amount of the *finance charge* in connection with the transaction", (emphasis added) provided that such liability shall not be less than $100 nor more than $1,000.

The clear language of the Act is buttressed by the Act's legislative history. Both the House and Senate reports reflect the intent to limit the application of the Act to transactions involving a finance charge:

> "[15 U.S.C. § 1631] . . . is a prefatory section setting forth the basic requirements to disclose. It is similar to the original S.5, except that it is made clear that disclosure need only be made to persons 'upon whom a finance charge is or may be imposed.' Thus, *the disclosure requirement would not apply to transactions* which are not commonly thought of as credit transactions, including trade credit, open account credit, 30-, 60-, or 90-day credit, etc., *for which a charge is not made.*" S. Rep. No. 392, 90th Cong., 1st Sess. 14 (1967); H.R. Rep. No. 1040, 90th Cong., 1st Sess. 25 (1967) (emphasis added).

The same intent is reflected in the House report:

> ". . . Title I is intended to provide the American consumer with truth-in-lending and truth-in-credit ad-

vertising by providing full disclosure *of the terms and conditions of finance charges* both in credit transactions and in offers to extend credit." H.R. REP. No. 1040, 90th Cong., 1st Sess. 1 (1967) (emphasis added).

During the 1964 hearings before the Senate Banking and Currency Committee's Subcommittee on Production and Stabilization, the Chairman of the Federal Trade Commission explained the application of the Act as follows:

> "First, there must be a transaction involving 'credit' as defined in section 3(2). Second, a 'finance charge' as defined in section 3(3) must be imposed in this transaction involving 'credit' as defined in section 3(2). Third, only a 'creditor' as defined in section 3(4) is required to make the disclosure required under this act.
>
> "In order to determine whether any transaction which involves credit within the meaning of section 3(2) falls within the scope of the bill, it is necessary to inquire whether a 'finance charge' is imposed; i.e., whether the borrower or credit purchaser is required to pay any amount which would not be incurred in a cash transaction." *Hearings on S. 750 Before the Subcomm. on Production and Stabilization of the Senate Comm. on Banking and Currency,* 88th Cong., 1st & 2d Sess., pt. 2, at 1304 (1964).

Thus, the Fifth Circuit's observation that "there must be found present a *'finance charge'*" before disclosure is required under the Act (Pet. App. 18a) is clearly correct. *See Castaneda* v. *Family Publications Service,* 4 CCH CONSUMER CREDIT GUIDE ¶ 99,564 (D. Colo. 1971); *cf. Otis* v. *Cowles Communications, Inc.,* No. C-71-550 RHS (N. D. Cal., Nov. 3, 1971). *See also Martinez* v. *Family Publications Service, Inc.,* No. 71-169-CIV-TC (S. D. Fla.,

Oct. 8, 1971). Each of those cases involved transactions identical in all material respects to the one in issue here.

There can be no doubt that the four installment rule seeks to expand the coverage of the Act. The district court held that the transaction in issue was subject to the disclosure requirements solely by virtue of the four installment rule. In other words, this transaction is not reached by the Act alone. Neither the petitioner nor the amici here seriously contend otherwise. Petitioner urges that the Board has "the power to reach transactions just *outside* the literal reach of the statute" (Pet. 15) (emphasis added).

While the Federal Reserve Board which promulgated Regulation Z has broad powers to ***implement*** the Act, it clearly does not have authority to ***extend*** the Act—and its civil and criminal penalties—to broad categories of transactions that Congress did not reach and declared an intention not to reach.* The principles upon which the courts are to deal with the over-zealous efforts of administrative agencies to remedy what they deem to be the shortfalls of congressional enactments have been well settled by this Court and were scrupulously followed by the court below. Thus, in *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U. S. 284 (1954), this Court struck down an FCC regulation intended to prevent the "circumvention" and "evasion" of the statutory prohibition of the broadcast of lotteries. The Court stated:

> "It is apparent that these so-called 'give-away' programs have long been a matter of concern to the Federal

*Another provision of Regulation Z (12 C.F.R. § 226.9 (1971)) has recently been held invalid for attempting to enlarge the scope of the Act. *N. C. Freed Co.* v. *Board of Governors of the Federal Reserve Sys.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,356 (W.D.N.Y. 1971).

Communications Commission; that it believes these programs to be the old lottery evil under a new guise, and that they should be struck down as illegal devices appealing to cupidity and gambling spirit. . . . Regardless of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of § 1304 does not provide the remedy." 347 U. S. at 296-97.*

See Addison v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944). *See also Zuber* v. *Allen*, 396 U. S. 168 (1969); *United States* v. *Calamaro*, 354 U.S. 351 (1957); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369-70 (1945).

The freewheeling administrative power, advocated by petitioner, to "correct any [congressional] oversights or omissions" (Pet. 13) is peculiarly inappropriate in the circumstances of the Truth in Lending Act. Contrary to petitioner's assertion, the Act is not a mere "rough outline" (Pet. 13) of what Congress had in mind. Perusal of the Act discloses that it is an extremely detailed statute that sets forth with precision the matters within and without its

*As here, the Court in *FCC* v. *American Broadcasting Co.* was faced with a civil case under a statute which also provided for criminal penalties. The Court observed:

"It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly." 347 U. S. at 296.

coverage.* *See Ebert* v. *Poston*, 266 U.S. 548, 554 (1925) ("Such care and particularity in treatment preclude expansion of the Act in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions.").

Furthermore, the supposition that, but for the four installment rule, undisclosed finance charges would remain undisclosed is absurd. The very purpose of the Act was to require the disclosure of undisclosed finance charges. To suggest that, in order to achieve that purpose, the Board had to eliminate a prerequisite to the Act's applicability explicitly imposed by Congress is to suggest an extraordinary incapacity of Congress to express its will.

The Petition also urges that the four installment rule reflects

> "the Board's apparent conclusion that it would not be feasible to determine for categories of transactions or on a case by case basis when the price paid by the consumer includes, purposely or otherwise, part of [*sic*] all of the costs necessarily incurred by the creditor in extending credit." (Pet. 17.)

Neither the petitioner nor the amici, however, explain how such indirect and unidentifiable credit costs are to be identified and accurately disclosed by those who would be

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*For example, § 1638(a)(7) provides for the disclosure of

> "The finance charge expressed as an annual percentage rate except in the case of a finance charge
>
> (A) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or
>
> (B) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.
>
> A creditor may not divide a consumer credit sale into two or more sales to avoid the disclosure of an annual percentage rate pursuant to this paragraph."

brought within the Act's coverage solely by virtue of the four installment rule. Yet it is clear that, if the Act is applicable, the failure to make such identification and disclosure with precision entails the risk of "millions of dollars in statutory damages" (Pet. 19), as well as criminal and administrative sanctions. Whatever validity the rule might have if it created merely a rebuttable presumption of the presence of a finance charge, neither the petitioner nor the amici explain what legislative purpose can be served by an irrebuttable presumption that, in effect, requires the disclosure of finance charges by creditors who do not impose finance charges. Since Congress explicitly recognized that some creditors do not impose finance charges (*see* 15 U.S.C. § 1602(f) and pp. 13-15, *supra*), the avowed purpose of the regulation is patently inconsistent with the congressional purpose.

In all events, we note that on January 3, 1972, the Federal Reserve Board recommended that Congress amend the Truth in Lending Act by enacting the four installment rule. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ANNUAL REPORT TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1971, at 22 (1972). Thus, Congress has had the supposed defect in the Act formally called to its attention and has had the opportunity to deal with it. We respectfully submit that Congress is the appropriate forum for the resolution of the question that petitioner urges upon the Court.

2. There is no conflict among the circuits. *Strompolos v. Premium Readers Service*, 326 F. Supp. 1100 (N.D. Ill. 1971), is cited by petitioner as being in direct conflict with the Fifth Circuit's decision in this action. However, *Strompolos* although certified by Judge Will under 28 U.S.C. § 1292(b) was settled on appeal before the Seventh Circuit Court of Appeals could consider the ruling below. Accordingly, there is no conflict between the circuits. More-

over, the other district courts which have considered the issues present here have all concurred with the Fifth Circuit. *See Otis* v. *Cowles Communications, Inc.*, No. C-71 550 RHS (N.D. Cal., Nov. 3, 1971) (motion for summary judgment granted on the ground that according to the undisputed facts, identical in all material respects to those present here, the Truth in Lending Act was inapplicable to the transactions in question); *Martines* v. *Family Publications Service, Inc.*, No. 71-169-CIV-TC (S.D. Fla., Oct. 8, 1971) (Cabot, J.); *Castaneda* v. *Family Publications Service*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,564 (D. Colo. 1971) ("The Court finds that the defendant, in carrying on its business of selling subscriptions to magazines, was not extending consumer credit to consumers upon whom a finance charge is or may be imposed and is not subject to the Act. The defendant is entitled to summary judgment of dismissal.")

3. Although the decision of the court of appeals is based entirely on the invalidity of the four installment rule, the judgment is sustained by two independent considerations that were advanced by FPS but which the court did not reach. Since either of those grounds would, we believe, require affirmance, this case could well be disposed of without reaching the question of the invalidity of the four installment rule—the only question as to which the petitioner and the amici seek review in this Court. *See, e.g., Langnes* v. *Green*, 282 U.S. 531, 538 (1931).

First, irrespective of whether the disclosure and administrative enforcement provisions of the Truth in Lending Act are applicable in the absence of a finance charge, the civil liability provision of the Act is inapplicable. That provision (15 U.S.C. § 1640(a)) specifies the recovery of an amount equal to

> "twice the amount of the finance charge in connection with the transaction, except that the liability

> under this paragraph shall not be less than $100 nor greater than $1,000 . . . ."

Under § 1640(a) the finance charge provides the measure of recovery. The minimum and maximum dollar amounts cannot reasonably be construed as providing an alternative means of determining the amount of a recovery in the absence of a finance charge because the language of § 1640(a) is not susceptible of an "either/or" interpretation. Indeed, Congress rejected a bill which provided for liability "in the amount of $100, *or* in any amount equal to twice the finance charge . . . whichever is the greater [up to $1,000]". S. 5, 90th Cong., 1st & 2d Sess. § 7(a)(1) (1967) (emphasis added).

Second, the Truth in Lending Act is inapplicable to the transaction in question for the fundamental reason that the transaction did not involve the extension of credit by FPS to Mourning.* It is the essence of a credit transaction that one party parts with value in reliance on the promise of another to pay at a later date. Under the standard FPS contract, however, FPS does not deliver anything in advance of payment. Quite the contrary, the customer pays in advance for the subsequent receipt of magazines. The customer pays over 30 months for magazines he will receive over 60 months. Thus, until the last magazine has been delivered at the end of the 60-month period, the customer has paid for more magazines than he has received. In short, it is the customer who extends credit to FPS and

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*In the amicus curiae brief submitted by the United States in the court of appeals by direction of the Solicitor General, the government declined to express its opinion as to "the threshhold [sic] question presented by the case (*i.e.*, whether the magazine transaction involved the . . . extension of credit) . . . ." The government stated:

> Since the validity of the four-installment rule is unrelated to that question, the Board has no interest in urging that it be decided one way or the other." (Brief, p. 13.)

It is clear from the opinion below that the court of appeals did not make any determination with respect to that question.

not vice versa. FPS enjoys the use of its customers' money during the period between receipt of payment and delivery of magazines. Obviously, if FPS should default in its performance under its contracts, its customers would be entitled to get their money back. In bankruptcy, FPS's customers would be its largest class of creditors. If, on the other hand, a customer defaults, FPS can make itself whole merely by terminating deliveries.

Petitioner points out (Pet. 16):

> "As a practical matter any creditor who permits a customer to defer payment of an obligation for goods or services already provided or paid for by the creditor must as a consequence borrow from a third party or his own capital reserves and incur a finance charge or resulting loss of interest."

Substantially the same point is made to this Court by the United States (Brief for the United States as Amicus Curiae, p. 10). That proposition, offered in explanation of the purpose of the Act, serves to demonstrate why the Act is inapplicable here. FPS does not permit "a customer to defer payment of an obligation for goods or services *already provided or paid for*" by FPS.* Consequently, FPS does not need to "borrow from a third party or [use its] own capital reserves". FPS does not itself, therefore, "incur a finance charge or resulting loss of interest". Accordingly, FPS does not experience a cost of credit that it must pass on to its customers.

Nor does the fact that the customer contracts to make periodic payments turn his obligation into a credit obligation. There are many contractual relationships which are not credit relationships. As Professor Corbin has stated:

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*There is nothing in the record that suggests that FPS pays the magazine publishers prior to receiving payment from its customers. The fact is that FPS generally pays publishers on a monthly basis over 30 months or more.

> "A transaction may be an instalment contract without being a credit transaction at all. Both parties may agree to perform in instalments without promising to render any performance in advance of full payment of the price of each instalment so rendered. Thus, a seller contracts to deliver wheat straw at the rate of three specified loads per fortnight, for the price of thirty-three shillings per load, payable on delivery; simultaneously with each delivery, the full price of each load is to be paid. Both parties promise to perform in instalments; but neither one promises any performance in advance of its exact agreed equivalent. Neither one risks an actual performance upon the mere word of the other." 3A A. CORBIN, CONTRACTS § 687 (1960) (footnote omitted).

In sum, a promise to make periodic deliveries in exchange for a promise to make periodic payments does not in itself give rise to a credit transaction. Obviously the fact that the FPS customer completes his periodic payment obligations under the contract before FPS has completed its performance can only show that this transaction is even less like a credit transaction than the one described by Professor Corbin.

The Act adopts the common understanding of a credit transaction.* The Act defines the term "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment". 15 U.S.C.

*"[The] disclosure requirements would not apply to transactions which are not commonly thought of as credit transactions. . . ." S. REP. No. 392, 90th Cong., 1st Sess. 14 (1967); H.R. REP. No. 1040, 90th Cong., 1st Sess. 25 (1967). "It did not attempt to alter or amend the pattern of legal rights and remedies afforded consumers and creditors under state law." 114 CONG. REC. 14487 (1968) (remarks of Senator Proxmire).

§ 1602(e). In the type of transaction in issue, there is no deferred payment but rather a prepayment by the customer because the customer has always paid for more magazines than he has received.

Moreover, there is clearly no "debt" within the meaning of the Act. A debt results from an unconditional agreement to pay and is to be distinguished from the obligations of a contract under which the performance of both parties lies in the future. *See, e.g., United States* v. *New York, New Haven and Hartford Railroad Co.*, 276 F.2d 525, 530 (2d Cir. 1959), *cert. denied*, 362 U.S. 961, 964 (1960); *McGee* v. *Stockes' Heirs*, 76 N.W.2d 145, 156 (N.D. 1956). A debt is not merely an agreement to pay money. *Evans* v. *Kroh*, 284 S.W.2d 329, 330 (Ky. Ct. App. 1955); *Park & 46th St. Corp.* v. *State Tax Commission*, 295 N.Y. 173, 178, 65 N.E.2d 763, 765 (1946). Thus, for example, in deciding whether a municipality's contract to pay for water services resulted in indebtedness in excess of the permissible debt limit, the Supreme Court in *Walla Walla City* v. *Walla Walla Water Co.*, 172 U.S. 1, 20 (1898), made the following distinction:

> "There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party performs the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment postponed."

See also Metropolitan Water District of Southern California v. *Marquardt*, 59 Cal. 2d 159, 379 P.2d 28, 28 Cal. Rep. 724 (1963).*

The district court rested its conclusion that FPS extended credit to petitioner on three propositions: (1) "[t]he promise to pay is unconditional and non-cancellable"; (2) "the written agreement provides that '[p]ayments due monthly, otherwise balance due'"; and (3) "Defendant, itself, considered the transaction to be a credit transaction, and that it was owed a debt by the Plaintiff." (Pet. App. 4a.) The first proposition is incorrect. The second and third propositions do not support the conclusion reached.

In the first place, petitioner's promise to pay was not unconditional. Certainly, if petitioner had not received her magazines, no court would have required her to continue making payments for them. Her promise was conditional on performance by FPS and thus did not create a debt. *See* 3A A. CORBIN, CONTRACTS § 687 (1960).

In the second place, the fact that under the agreement FPS could require payment of the full balance if petitioner became indebteded to FPS through her default does not show that FPS undertook to extend credit. On the contrary, the "balance due" clause only underscores FPS's determination that it not be put in the position of a creditor, either voluntary or involuntary, and that the customer be held to her initial undertaking for prepayment.

Finally, the district court's statement that FPS "considered the transaction to be a credit transaction, and that

*The term "debt" is given the same construction for federal income tax purposes as the Supreme Court gave it in *Walla Walla*. There is no valid debt which would allow a bad debt deduction under § 166 of the Internal Revenue Code unless there is an *unconditional* obligation of another to pay the taxpayer. See cases collected in 5 J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION § 30.03 n.29 (1969). The existence of a note is not in itself conclusive of the existence of a debt. *John Kelley Co.* v. *Commissioner*, 326 U.S. 521, 530 (1946).

it was owed a debt by the Plaintiff" presumably refers to collection letters sent petitioner after she failed to make payments. Surely the fact that petitioner became indebted when she failed to pay, although she was receiving the magazines she had ordered, does not show that the contract provided for the creation or deferment of such debt. Petitioner's breach of her contractual obligations (which required prepayment) did not retroactively convert the underlying transaction into a credit transaction within the meaning of the Act.

In sum, it is clear that the transaction in issue does not involve the extension of credit. Accordingly, it does not fall within the scope of the Act and, indeed, is plainly not the type of transaction about which Congress was concerned and with which Congress intended to deal.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

February 25, 1972.

Respectfully submitted,

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